No. 80-2070
No. 81-24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

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April 19, 1982

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REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

I. SUMITOMO, AS A WHOLLY-OWNED SUBSIDIARY OF ITS JAPANESE PARENT, IS ENTITLED TO INVOKE THE EMPLOYMENT RIGHT GRANTED IN ARTICLE VIII(1) OF THE TREATY.

Respondents contend that, because Sumitomo is organized under the laws of New York, it is not a company of Japan and thus is not covered by Article VIII(1) of the Treaty, even though it is a wholly-owned subsidiary of a Japanese company. A complete answer to this contention is given in an August, 1979 telegram from the Department of State to the American Embassy in Tokyo:

> DEPARTMENT REITERATED . . . VIEW SET FORTH IN MARKS LETTER THAT FCN COVERS INVESTMENT THROUGH HOST COUNTRY-INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. . . . EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES [from Article VIII(1) coverage] WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, ¶ 2, Aug. 29, 1979.[1] This document, unusually direct and unequivocal for diplomatic correspondence, accurately states Sumitomo's position. It was not previously cited to this Court because it was not released by the Department until March 11, 1982, after all the principal briefs in this case had been filed, the last of the official documents to be dribbled out by the Department over the long course of this litigation.[2]

On this issue, the great bulk of both respondents' and the government's briefs is devoted to the proposition that Sumitomo is not a company of Japan as defined in the Treaty. The argument consists chiefly of minute textual exegesis of State Department telegrams and instructions, shards of testimony before congressional committees, and comments of Herman Walker, the moving spirit of the FCN treaty program. As our principal brief shows, the same texts can be adduced, and more persuasively we submit, to support Sumitomo's position. Pet.

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1 The telegram and the covering letter of the Department of State releasing it are reproduced and reprinted in full in Appendix A, *infra*, at p. 1a.

2 Appendix B, *infra*, at p. 9a, contains a chronology of the State Department's selective release from its archives of documents relating to the negotiating history of the Treaty. Interestingly, the message from Tokyo to which the above-quoted telegram from the Department responded and another answering message from Tokyo were released by the Department on November 30, 1981, and are relied on by the respondents in their brief in this case. Res. Br. at 15.

Br. at 35-41.[3] In truth, however, although this material throws light on the context and general orientation of the FCN treaty program, none of the negotiating documentation is addressed to the precise question before the Court: may a domestic subsidiary of a foreign investor invoke Article VIII(1) rights?

On that question, the whole elaborate textual analysis in the respondents' and government's briefs is simply beside the point. It is beside the point because Sumitomo is entitled to the benefit of Article VIII(1) *whether or not it is a company of Japan*. *See* Pet. Br. at 40-41.

1. If Sumitomo is regarded as a company of Japan within the meaning of Article VIII(1), then, as all agree, it is the right-holder by direct operation of the language of the Article.[4]

2. But even if Sumitomo is not so regarded, its parent, Sumitomo Shoji Kabushiki Kaisha, is undeniably a company of Japan. As such it is entitled under the Treaty to engage executive and specialist personnel of its choice to manage and control its investment. To make the parent's right effective, Sumitomo, the subsidiary, must be permitted to invoke it defensively in cases like the present, charging that an employment practice insulated by the Treaty is in violation of domestic laws. The principle that a party with standing may assert the rights of a third party where that is essential to make those rights effective is a familiar one. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). It has been recognized even in the sensitive field of constitutional adjudication. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *see* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

Careful analysis of the opinion below reveals that it relies on both of the above theories as alternative bases of decision.

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3 Briefs and Appendices filed in this Court are referred to as follows:

Brief for Petitioner and Cross-Respondent	Pet. Br.
Brief for Respondents and Cross-Petitioners	Res. Br.
Brief for the United States as *Amicus Curiae*	U.S. Br.
Appendices to the Petition for a Writ of Certiorari	Pet. App. __a.
Joint Appendix	App. __a.

4 That a subsidiary is a company of Japan for purposes of Article VIII(1) does not necessarily imply that it will be so regarded with respect to all other treaty provisions.

Adopting the first rationale above (the piercing-the-veil approach), it says:

> Since Sumitomo is a wholly-owned subsidiary of a Japanese corporation, it is properly classified as a Japanese company for the purpose of invoking . . . Article VIII.

638 F.2d at 557-58, Pet. App. at 11a-12a. Earlier in the opinion, speaking to the second rationale above (the parent's-right approach), the court said:

> [T]he Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form . . . .

Id. at 555-56, Pet. App. at 7a-8a. *See also Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981) (Weinstein, C.J.: "A New York subsidiary of a Japanese parent could . . . invoke whatever rights its parent had under applicable Japanese-American treaties . . . ," citing the opinion below).

Indeed, from the government's brief in this Court it appears that the United States itself is by no means prepared to reject the parent's-right rationale. It acknowledges that,

> as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above, even if the Court concludes that Sumitomo is not a company of Japan that may invoke the special employment privilege in Article VIII(1) of the Treaty.

U.S. Br. at 6. And again:

> [B]ecause Sumitomo's parent corporation apparently is a company of Japan, the parent might well have discretion protected by the Treaty to select Japanese nationals for

> certain top-level managerial positions in Sumitomo through the exercise of the parent's right under Article VIII(1) to engage "executive personnel" of its choice in the United States to the extent necessary to effectuate its right under Article VII(1) to "control and manage" Sumitomo.

Id. at 21-22; *see also id.* at 22 n.12.

The convergence of the two rationales and the Second Circuit's indifference as between them stem from an explicit recognition that the overriding purpose of the Treaty is to protect and promote foreign investment. Thus, the court concluded that respondents' reading "would overlook the purpose of the Treaty, which was not to protect foreign investments through branches, but rather to protect foreign investments generally." 638 F.2d at 556, Pet. App. at 8a. For the Fifth Circuit, also, respondents' interpretation "would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 358 (5th Cir. 1981), Pet. App. at 71a.

What is entirely missing from respondents' lengthy textual analysis is the suggestion of any plausible reason why U.S. negotiators would have sought to distinguish between employment rights with respect to U.S. branch operations abroad and U.S. foreign investment carried out through locally incorporated subsidiaries. Respondents assert that "the terms were carefully chosen to give specific and distinct rights as between companies of each party and their subsidiaries operating in a host country." Res. Br. at 8.[5] The government says that "to the

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5 The suggestion that the Treaty employs a carefully worked out dichotomy between companies of a Party and subsidiaries is unwarranted. In fact, the Treaty never uses the word "subsidiaries." In addition to "companies of a party," the Treaty uses a wide variety of terms to refer to the entities it covers: "an enterprise in which [nationals of a Party] have invested . . . a substantial amount of capital," Art. I(1); "enterprises which [nationals and companies of the other Party] have established," Art. V(1); "enterprises in which nationals and companies of [the other] Party have a substantial interest," Art. VI(4); "enterprises which [nationals and companies] control," Art. VII(1); "enterprises . . . which are owned or controlled by nationals

extent that there are differences in treatment depending on the place of incorporation, *there is every reason to believe* that the Parties intended precisely that result." U.S. Br. at 15 (emphasis added). And Judge Reavley's dissent finds it "*very reasonable* that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws . . . ." *Spiess v. C. Itoh, supra*, 643 F.2d at 369, Pet. App. at 92a (emphasis added). But the reasons supporting these "reasonable" beliefs are never identified.

This failure to offer a concrete reason in support of a distinction in the employment right as between branches and subsidiaries is easily explained. There is no such reason. On the contrary, all the policy considerations that animated the American negotiators argue for rights of control and management that are equal as between branches and subsidiaries. At least since World War II, American direct investment abroad has overwhelmingly taken the form of locally incorporated subsidiaries. It was to accommodate this preference that Herman Walker and his colleagues in the State Department designed the new post-war version of the FCN Treaty.

> [I]nvestors choose to operate abroad not only through branches of corporations of their own country, but also very frequently through subsidiaries chartered under the laws of the foreign country where operations are conducted. Systematic treatment, therefore, required the introduction of provisions to cover this situation, a step representing something of a departure from traditional treaty concepts. Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it—e.g., for individuals who are its nationals, for entities which owe their existence to its laws, for ships which fly its flag. Here however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the

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and companies," Art. VII(2); "alien-controlled enterprises," Art. VII(3); "enterprises controlled by such nationals and companies," Art. VII(4); "companies of [one] Party controlled by [the other's] nationals and companies," Art. XVI(2).

purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 233 (1956); *see also Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess. 4-5 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Econ. Affairs). One of the main objectives of the Treaty, as revealed by Article VII and implemented in Article VIII(1), was to permit American investors abroad to choose the form of organization of their investments without sacrificing their rights of control because of irrelevant technical and formal distinctions. *See Walker, supra*, 5 Am. J. Comp. L. at 236 (treaty text designed, *inter alia*, "to emphasize the owners' prerogatives of control and management").[6]

As of year-end 1980, $180 billion out of $213.5 billion, or 84% of U.S. direct investment abroad, was in incorporated affiliates. Whichard, *U.S. Direct Investment Abroad in 1980*, U.S. Dep't of Commerce, Survey of Current Business 20, 22, Table 3 (Aug. 1981). No wonder the State Department said that respondents' interpretation excluding subsidiaries from the coverage of Article VIII(1) "would gut Japanese FCN Treaty of most of its value . . . ." Appendix A, *infra*, at 3a. The "reasonable" beliefs and suppositions indulged by respondents, the government and Judge Reavley would expose the overwhelming bulk of U.S. foreign investment in Japan (and of Japanese foreign investment in the United States) to the type of domestic legislation restricting employment of

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6 The argument that the investor, having chosen the corporate form, must accept the burdens along with the benefits, though superficially attractive, is question-begging. The very purpose of the FCN treaties was to change the normal incidence of burdens and benefits as between forms of business enterprise to accommodate the preference for the corporate form. To say what package of burdens the foreign investor "must accept" when it chooses the corporate form, one must first look to the substantive provisions of the Treaty. That is, we must first decide whether Article VIII(1) extends to subsidiaries before we can know the effect on the employment right of choosing the corporate form for the investment.

executives and specialists against which Article VIII(1) was designed to protect the foreign investor.

Once this central point is grasped, as both the Courts of Appeals grasped it, it is a matter of indifference, or at best aesthetic preference, whether the protection of the Treaty is extended to these subsidiaries by piercing the corporate veil or by recognition of the parent's right.

It remains only to address the various governmental positions put before the Court. The government proffers in support of respondents' position a communication from the Japanese Ministry of Foreign Affairs rejecting the piercing-the-veil approach. Statement of the Japanese Ministry of Foreign Affairs delivered to U.S. Embassy, Tokyo, on February 26, 1982, *reprinted in* Dep't of State Telegram No. 03300 from U.S. Embassy, Tokyo, to the Dep't of State, Feb. 26, 1982, U.S. Br., App. B at 14a-15a; *but see* Brief herein for the Ministry of International Trade and Industry of the Government of Japan as *Amicus Curiae*. The foreign treaty partner's construction, however, is not decisive on the question of the scope of treaty obligations. *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933). The considerations adduced in that case are especially weighty here, where numerous treaties "which employ similar structure and terminology" will be affected by the Court's decision. Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, Aug. 29, 1979, Appendix A, *infra*, at 3a. Indeed, the Danish government, a party to one of these treaties, has officially aligned itself in this Court in support of Sumitomo's position. *See* Statement of the Danish Government Concerning the Interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951 (Dec. 23, 1981), *reprinted in* Brief *Amicus Curiae* for the East Asiatic Co., Ltd. *et al.* in Support of Petitioner Sumitomo Shoji America, Inc., App. B at 31a.

As to the stance of the U.S. Government, its present assertion that domestic subsidiaries are excluded from Article VIII(1) coverage is certainly not the kind of consistent, long-standing administrative interpretation that is entitled to significant weight in the courts. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Only two weeks

before issuing the Atwood letter on September 11, 1979 (App. 307a), the State Department was saying that the position in that letter would "gut" the Treaty. *See* Dep't of State Telegram No. 227464. Appendix A, *infra,* at 3a.[7] The Fifth Circuit rightly dismissed the Atwood letter "as an aberration in State Department policy." *Speiss v. C. Itoh, supra,* 643 F.2d at 358 n.3, Pet. App. 70a n.3. The teaching of *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956), is applicable here: "Against . . . prior longstanding and consistent administrative interpretation . . . [a] more recent *ad hoc* contention as to how the statute should be construed cannot stand."

The government disparages the earlier Marks letter (App. 94a) which supported Sumitomo's position, with the comment that it "set forth no legal analysis of the question." U.S. Br. at 19. But as the Second Circuit remarked,

> both [the Marks and Atwood] letters were conclusory in tone, providing little guidance as to how the authors reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 [Atwood] letter explain how the 1978 letter writer [Marks] had fallen into error.

638 F.2d at 558 n.5, Pet. App. at 12a n.5.

In this Court the government comes down on the Atwood side of the Atwood-Marks argument, thus rejecting the piercing-the-veil rationale discussed above. In doing so, however, it has some difficulty dealing with the regulations promulgated under the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* (the "INA"), authorizing treaty trader visas for persons employed by U.S. companies controlled by foreign nationals. 22 C.F.R. § 41.40 (1981). The regulations speak of such companies as "having the nationality of the treaty country." The government parries with the assertion that the INA has been administratively broadened in this respect. U.S. Br. at 6. But the INA requires that for a treaty trader visa to issue, the alien must be "*entitled* to enter the United States under and in pursuance of the provisions of a treaty of commerce and

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7 Nowhere in its brief does the United States attempt to deal with this telegram.

navigation . . . ." INA § 101(a)(15)(E)(emphasis added). The government's brief does not explain how administrative fiat can expand the entitlement under the Treaty. Thus, despite what the government may say here, the regulations it enforces expressly adopt the piercing-the-veil approach to Article VIII(1) rights.

As to the parent's-right approach, the government's brief is much more hospitable—one might almost say inviting—as demonstrated above. *See* pp. 4-5, *supra*. Perhaps the figures cited above on the proportion of U.S. investment abroad that is conducted through incorporated affiliates may account for this Janus-like attitude in the government's brief. Whatever the reason, at bottom, the position of the government and that of Sumitomo are not as irreconcilable as may at first appear.

In any case, the usual strictures about the weight to be given to official interpretation of treaties are inapposite here. The varying governmental positions presented to this Court are neither uniform nor consistent enough to control the interpretation of Article VIII(1). They certainly should not operate to frustrate the manifest objective of the Article to permit U.S. (and so, reciprocally, Japanese) investors to employ their fellow-citizens in executive and specialist positions in their enterprises abroad, no matter what the form of business organization in which these enterprises are cast.

II. THE TREATY PRECLUDES A TITLE VII ATTACK ON SUMITOMO'S EMPLOYMENT OF JAPANESE TREATY TRADERS IN EXECUTIVE AND SPECIALIST POSITIONS.

Sumitomo's position is that the Treaty affords a Japanese investor the right to manage and control its investment by engaging Japanese nationals of its choice in executive and other specialist positions. The scope of this right is spelled out in the treaty trader provisions of the INA and the regulations thereunder.

The basic source of the employment right is Article VIII(1) of the Treaty, although, as pointed out in our brief at pages 20-22, that Article must be read together with Article VII (establishing the right of Japanese investors to "manage and

control" their enterprises in the United States) and Article I (providing for entry of Japanese nationals for purposes of carrying out U.S. Japanese trade and related commercial activities). INA § 101(a)(15)(E) is also directly relevant in the construction of the treaty right. It was enacted during the period when the post-World War II FCN treaties were being negotiated and was designed to carry out their entry and employment provisions.[8] Together with its implementing regulations, it reflects the contemporaneous understanding of Congress as to the scope of the rights granted.[9]

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8 Congress first recognized the alien trading provisions of FCN treaties by creating a new category of non-immigrant aliens "entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present, existing treaty of commerce and navigation" in the Immigration Act of 1924, ch. 190, § 3(6), 43 Stat. 153, 155. The treaties then in force gave blanket rights "to carry on trade, wholesale and retail," *e.g.*, Treaty of Commerce and Navigation between the United States of America and Japan, Feb. 21, 1911, Art. I, 37 Stat. 1504, or "to engage in . . . commercial work of every kind . . . ." Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, Dec. 8, 1923, Art. I, 44 Stat. 2132, 2133. Under these provisions aliens gained entry for the purpose of carrying on purely local trade or business. In the belief that this went beyond the intention of the treaties, Congress, in 1932, amended the Act to authorize treaty trader visas for entry "solely to carry on trade between the United States and the foreign state of which [the alien] is a national . . . ." Act of July 6, 1932, ch. 434, 47 Stat. 607-08. The post-World War II FCN draft picked up this limitation, *see, e.g.*, United States-Japan Treaty, Art. I(1)(a), and added a further category of entries "for the purpose of developing and directing the operations of an enterprise in which [the alien has] invested . . . a substantial amount of capital . . . ." *Id.* Art. I(1)(b). This new category was promptly reflected in the "treaty investor" provisions of the 1952 Act. INA § 101(a)(15)(E)(ii). Thus, it is apparent that, from the beginning, the treaty trader provisions of the immigration laws were designed to carry out U.S. obligations under the FCN treaties, and the post-World War II modernization of both the INA and the treaties reflects a single, coherent legislative intention.

9 The present regulations do not differ materially from those first adopted to implement INA § 101(a)(15)(E)(i). *Compare* 22 C.F.R. § 41.40 (1981) *with* 17 Fed. Reg. 11577 (1952) (predecessor regulation). A technical change occurred in 1959 when the words "under and in pursuance of the provisions of a treaty of commerce and navigation" were replaced by language spelling out the meaning of that requirement: "[that the alien] will be engaged in duties of a supervisory or executive character, or . . . has special qualifications that will make his services essential to the . . .

There should be no uncertainty about the scope of Sumitomo's claim. *Cf.* U.S. Br. at 22 n.13. Sumitomo takes the position that it is entitled to everything the Treaty gives it—the right "to engage . . . accountants and other technical experts, executive personnel, attorneys, agents and other specialists of [its] choice"—without limitation by Title VII. The content of these categories is spelled out in the INA and its implementing regulations governing the issuance of E-1 or treaty trader visas. Thus, the question whether a particular Sumitomo employee falls within the protection of Article VIII(1), and therefore outside the scope of Title VII, depends on whether that employee has been able to demonstrate to the State Department and the Immigration and Naturalization Service that he is entitled to hold an E-1 visa.[10]

The statutory and regulatory scheme is summarized at pages 3-6 of the government's brief. For a treaty trader visa to issue, the applicant must be "engaged in duties of a supervisory or executive character," in accordance with rigorously and narrowly defined criteria. U.S. Br. at 4, *citing* 22 C.F.R. § 41.40(a)(2); 9 Foreign Affairs Manual, Part II, § 41.40 Notes 10 and 13, *id.* § 41.41 Note 4. More particularly, in accordance with recent instructions issued by the State Department, "a position will be regarded as 'executive' or 'supervisory' for treaty trader purposes only if it is a top-level management

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employer's enterprise . . . ." 24 Fed. Reg. 6683 (1959). In 1974 a similar clarification made it explicit that "[t]he employment [of the applicant] must be by an individual employer having the nationality of the treaty country . . . or by an organization which is principally owned by . . . persons having the nationality of the treaty country . . . ." 39 Fed. Reg. 26153-54 (1974). The regulations thus reflect clearly all three of the Treaty Articles referred to in the text, at pages 10-11, *supra*. The original version looked most directly to the entry provisions of Article I. The 1959 elaboration specifically limiting entry to executive and specialized personnel draws from Article VIII(1). The 1974 revision, focusing on the identity of the treaty trader's employer, evokes the control and management conception of Article VII(1).

10 During Fiscal Year 1980 the Department of State issued 27,301 treaty trader and treaty investor visas for all countries. U.S. Dep't of State, Bureau of Consular Affairs, Immigrant Visa Control & Reporting Division, *Statistics on Nonimmigrant Visa Issuances During Fiscal Year 1980*. The group protected by FCN treaties thus represents an infinitesimal fraction of the U.S. job market.

position." The visa cannot issue unless "the position the alien would occupy 'principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation . . . .' " As to other specialized personnel, the government's account shows that they must be "truly essential to the firm's operations in the U.S." in the sense that they perform functions "that an American worker cannot do or cannot be trained to do . . . ." U.S. Br. at 5, *citing* Dep't of State Telegram No. 089624 to Japanese Posts, ¶¶ 2-10, sent to all Diplomatic and Consular Posts on July 10, 1981, *reprinted in* U.S. Br. App. A. (instruction regarding the assessment of an "executive/supervisory position" and "essential skills"). In short, E-1 visas may be issued only to members of a core group of key executives and specialists necessary for the investor to control its U.S. enterprise.

The government accepts that "as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above . . . ." U.S. Br. at 6. That is exactly the position Sumitomo takes in this case, adding only that the scope of the categories "executive personnel" and "other specialists" is defined by INA § 101(a)(15)(E) and its regulations, specifying the requirements for treaty trader visas.[11]

The right as thus defined is unqualified in the sense that it is not contingent on the treatment of domestic enterprises (national treatment) or on the treatment of enterprises of third countries (most-favored-nation treatment). In particular, it is non-contingent in that it is designed to override restrictions in the law of the host country upon the employment of home country nationals in the covered positions.

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11 At one point, the government raises the possibility of a distinction between "executive personnel" and the other Article VIII(1) categories. It suggests that the latter may not fall within the investor's right to "control and manage" its subsidiary granted in Article VII. U.S. Br. at 22 n.12. But when we recall that for an E-1 visa to issue to someone other than an executive or supervisory employee, he must be "truly essential to the firm's operations in the U.S." and without a U.S. counterpart, *id.* at 5, it hardly seems possible that an investor could control and manage the enterprise unless it could engage such home country nationals.

Title VII, if applied to "executive personnel" and "other specialists" necessary to manage and control the investment, would be the very kind of local legislation against which the Treaty sought to protect the foreign investor. There is no doubt that if respondents had their way, Title VII would restrict the right of Sumitomo to employ Japanese nationals in these executive and specialist positions. Indeed, that is the very object of plaintiffs' lawsuit: the complaint asks for an injunction "[d]irecting defendant to promote plaintiffs . . . to executive, managerial, and/or sales positions . . . ." App. 10a. Respondents have not produced a scrap of evidence, either in the language of Title VII or in its legislative history, to suggest that Congress intended, or was even aware of the possibility of such a drastic abridgement of treaty rights. In the absence of such an expression, the unquestioned doctrine is that the Court will not so construe the statute. *Cook v. United States*, 288 U.S. 102, 119-20 (1933); *see Weinberger v. Rossi*, No. 80-1924, ____ U.S ____, 50 U.S.L.W. 4354, 4355-56 (Mar. 31, 1982).

In order to avoid the force of the injunction against implied abridgement of treaty rights, respondents seek to construe away any such encroachment by an impermissibly restrictive interpretation of the object of Article VIII(1). They contend that the Article was designed only to override "bad" restrictions on investor choice of personnel—so-called "percentile limitations"—not "good" restrictions, like anti-discrimination laws. But this proposition (which incidentally *concedes* that the Article VIII(1) right is non-contingent) cannot stand.

The language of the Article, which is unmistakably affirmative, provides no basis for such constricted reading. So respondents are compelled to seek support in scraps of negotiating history and general commentary on the Treaty. For example, they cite Herman Walker's proposition that the objective of the Treaty "is to secure non-discrimination, or equality of treatment: a sort of 'equal protection of the laws' objective." Res. Br. at 27, *quoting* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 810-11 (1958). That remark, however, occurs in a passage discussing "the extensive use of so-called contingent standards as the cornerstone of rule-making." *Id.* at 810. As has been pointed out, Article VIII(1) is one of the few provisions of the

Treaty that is explicitly *non*-contingent. Walker himself identified it as such. *Id.* at 811, 813. And in commenting specifically on the question of employment rights, he said that the Article was directed against "percentile restrictions *and the like* . . . ." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Thus, he expressly recognizes that it is not confined to percentile restrictions *simpliciter. See also* Brown, *Treaty, Guaranty, and Tax Inducements for Foreign Investments*, 40 Am. Econ. Review, Papers & Proceedings 486, 487 (1950).

The negotiating documents relied on by respondents are equally insubstantial. The Foreign Service Despatch on the German treaty quoted at page 22 of respondents' brief says only that the "major special purpose" of the Article—not the exclusive purpose—"is to preclude the imposition of 'percentile legislation.' " Indeed, read as a whole, the document supports Sumitomo's position:

> The first sentence [of Article VIII(1)] is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel.

Foreign Service Despatch No. 2529 from HICOG, Bonn, to the Dep't of State, March 18, 1954, App. 181a, 182a.

Similarly, the Japanese documents do not support respondents' limited construction of Article VIII(1). The 1951 despatch quoted by respondents does show, of course, that the Japanese inquired whether there were some professions in the U.S. to which entry was barred by reason of alienage. Res. Br. at 21, *quoting* Foreign Service Despatch No. 915 from USPOLAD, Tokyo, to the Dep't of State, Dec. 17, 1951, App. 120a, 123a. The Department replied in the affirmative and pointed out that paragraph (2) of Article VIII, as opposed to paragraph (1), was addressed to this problem. *See* Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a, 134a. Indeed, it was *only* as to such professions and licensed occupations that legislation excluding aliens was in effect in the 1950s. *See, e.g., Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392

(1927) (upholding state statute requiring owners of licensed pool halls to be citizens). There were no percentile limitations on the employment of "executive personnel" at that time, because such legislation as applied to general employment has been unconstitutional at least since this Court's decision in *Truax v. Raich*, 239 U.S. 33 (1915). Nor was there percentile legislation in Japan in 1952. *See* Alexander, *Foreign Investment Laws and Regulations of the Countries of Asia and the Far East*, 1 Int'l & Comp. L. Q. 29, 37 (1952).

In any case, it is artificial to construe Article VIII(1), as respondents would have it, by an imputation of what "the Japanese negotiators were seeking . . . . " Res. Br. at 21. As has repeatedly been shown, the FCN treaties in general and the employment provisions in particular were put forward by the United States. *See* Pet. Br. at 23-25. Respondents themselves concede that U.S. opposition to foreign requirements for local hiring was an important motivating factor underlying Article VIII(1). Res. Br. at 22 n.25. And the government's brief acknowledges that

> [t]he purpose of Article VIII(1) was to override these percentile restrictions *so that American businesses operating abroad would be able to select U.S. nationals for essential positions.*

U.S. Br. at 24-25 n.14 (emphasis added).

Today, thirty years later, Sumitomo seeks only that same right.

Of course, Title VII does not by its terms prefer U.S. citizens over aliens. But its practical consequences for the foreign investor, should respondents prevail, do not look so very different from the "percentile legislation" concededly overridden by the Treaty. Defendants who are found to have violated Title VII in class actions such as this one are frequently faced with decrees requiring percentage hiring quotas or goals proportionate to the share of the plaintiffs in the relevant employment pool. *E.g.*, *Association against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981) (city must offer 41% of firefighter positions to minority group applicants during relevant period); *Phillips v. Joint*

Legislative Committee, 637 F.2d 1014 (5th Cir. 1981) (state agencies required to set goals of approximately 20% for black employees and to hire one black for every two whites until goal is achieved); *United States v. Elevator Constructors Local No. 5*, 538 F.2d 1012 (3d Cir. 1976) (union ordered to establish a goal for black membership of 23% and a black referral quota of 33%); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (employer ordered to promote one black foreman for every white until there are 15 black foremen in plant). Similarly, employers seeking to protect themselves against Title VII actions may be well advised to hire on a quota basis to avoid the statistically "disparate impact" that makes out a *prima facie* case under Title VII. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 956-57, 1026 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (proof of disparate impact of employment practices makes out *prima facie* case of Title VII violation). In other words, the application of Title VII that the respondents propose here could well give rise to a restrictive quota on hiring of Japanese nationals, not so different in effect, even if worlds apart in motivation, from the "percentile limitations" admitted to have been the principal target of Article VIII(1).

Here again, the government seems, in effect, to agree with Sumitomo's position. It suggests that Article VIII(1) may "itself constitute[] a legislative-type validation (as a 'business necessity') of a citizenship preference (at least for the top-level 'executive' positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis." U.S. Br. at 26. This is an unnecessarily involuted way of reaching the result. There is no need to read Article VIII(1) as a "legislative-type" business necessity exception to Title VII, which was, in any event, enacted after the adoption of the Treaty and so could not have been amended by it. It is much more straightforward to say that Article VIII(1) establishes a non-contingent right to employ Japanese nationals in executive and specialist positions and that Title VII is therefore inapplicable to those employees. That is exactly what the government suggests in the footnote to the sentence quoted above:

> Article VII(1) of the Treaty gives nationals and companies of Japan the right to "control and manage" their enterprises in the United States, and it could be argued that the discretion to select top-level "executive personnel" in whom the nationals and companies have confidence is a necessary component of that right.

Id. at 26 n.16. It not only "could be argued," but that is exactly what Sumitomo *does* argue. We add only that the necessity implicit in Article VII(1) is made explicit in Article VIII(1). And the scope of the terms "executive personnel" and "other specialists" is defined by the contemporaneous enactment of INA § 101(a)(15)(E) and its implementing regulations.

These questions of treaty and statutory interpretation are fully ripe for adjudication on the record as it stands, contrary to the contention of the government. U.S. Br. at 23-30. Sumitomo's motion to dismiss presents a pure question of law and needs no further factual amplification. The legal issue tendered here is whether Sumitomo is entitled to employ Japanese nationals qualifying for treaty trader visas in executive and other specialist positions in accordance with Article VIII(1) of the Treaty, INA § 101(a)(15)(E)(1) and the regulations thereunder, without limitations flowing from the provisions of Title VII.

The case was heard and disposed of below on the footing that the positions in controversy are occupied by Japanese nationals carrying E-1 treaty trader visas. Plaintiffs' allegations of discrimination "on the basis of nationality," Complaint ¶ 13, App. 9a, are addressed to "Sumitomo's practice of employing almost exclusively Japanese men" for these positions, as appears from their brief. Res. Br. at 5. In this Court, respondents further acknowledge that "many, if not all, of the persons who are classified as 'Oriental' [in Sumitomo's EEO-1 report], entered the United States as treaty traders." Res. Br. at 30. And the government appears to agree that they are probably all "executive personnel" within the meaning of the Treaty. U.S. Br. at 26 n.16; *see id.* at 29 n.18. Even if a remand were appropriate for formal proof of which particular employees have E-1 visa status, the proof would be mechanical and

ministerial. It would not alter or illuminate the legal issue presented.

That issue should be resolved on the record before this Court. Far from remanding without reaching the question, the Court should decide it now as a matter of sound judicial administration. Only by doing so can it provide authoritative guidance for any further proceedings that may be necessary, thus preventing needless proliferation of issues for trial and possibly another appeal to this Court.

III. SUMITOMO'S CITIZENSHIP PREFERENCE DOES NOT VIOLATE TITLE VII IN ANY EVENT.

As this Court held in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), nationality is not a prohibited criterion of employment under Title VII. Respondents' effort to remedy their employment grievances by invoking that statute stretches it far beyond what it can bear. The class of persons allegedly discriminated against—persons residing in the United States who are not Japanese treaty traders—is, by any measure, overly broad. It is surely not the kind of historically disadvantaged class of persons that Title VII was designed to protect. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (purpose of Congress was "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 203 (1979) ("[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."). No stigma attaches in American society to the condition of not being Japanese.

Respondents seek to construct claims of discrimination not only on grounds of "nationality" but also on grounds of "sex" and "national origin." The government's brief suggests the addition of the category "race." U.S. Br. at 7 n.4. One is left to speculate why they have omitted "color," since few Japanese

are black, white or brown, and "religion," in view of the well-known paucity of Hindus, Moslems, Christians and Jews in Japan. But respondents' subsidiary claims are all disposed of by the principle of Occam's razor: "What can be done with fewer [assumptions] is done in vain with more." The New Columbia Encyclopedia 2981 (4th ed. 1975). Respondents' lack of Japanese nationality (the essential criterion for treaty trader status) sufficiently explains their exclusion from the hiring preference; it is, hence, irrelevant that they may also be female or Christian or Mexican-American or fair-skinned or tall.

In the last analysis, respondents are attempting to use Title VII for a purpose Congress never intended. Protection of job opportunities for Americans as against nonimmigrant foreign nationals is a function not of Title VII, but of the Immigration and Nationality Act. Plaintiffs' complaint confuses these disparate statutory schemes.

Conclusion

For the reasons developed in this and the principal Brief for Petitioner and Cross-Respondent, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded with directions to dismiss.

Respectfully submitted,

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